

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DEMARENE COLEMAN,

Case No. 2:24-cv-00078-RFB-MDC

Petitioner,

ORDER

V.

WARDEN NAJERA, et al.,

Respondents.

8 Pro se Petitioner Demarene Coleman filed a Petition for Writ of Habeas Corpus pursuant
9 to 28 U.S.C. § 2254 (“Petition”), a motion for leave to proceed in forma pauperis, and a motion
10 for the appointment of counsel. ECF No. 1, 1-1, 1-2. The Court ordered Coleman to file his missing
11 *in forma pauperis* application documents. ECF No. 3. Coleman timely complied. ECF No. 4. This
12 matter now comes before the Court on initial review of the Petition under the Rules Governing
13 Section 2254 Cases (“Habeas Rules”). For the reasons discussed below, the Court instructs
14 Coleman to show cause why his Petition should not be dismissed as untimely.

I. BACKGROUND¹

16 Coleman challenges a conviction and sentence imposed by the Eighth Judicial District
17 Court for Clark County (“state court”). State of Nevada v. Demarene Coleman, 05C215295-1. On
18 August 22, 2007, and September 6, 2007, the state court entered a judgment of conviction and
19 amended judgment of conviction, respectively, pursuant to a guilty plea, for first-degree murder
20 and battery with the use of a deadly weapon. Coleman was sentenced to 20 to 50 years for the first-

¹ This Court takes judicial notice of the online docket records of the Eighth Judicial District Court and Nevada appellate courts. These dockets are found at: <https://www.clarkcountycourts.us/portal> and <http://caseinfo.nvsupremecourt.us/public/caseSearch.do>.

1 degree murder conviction and 4 to 10 years for the battery conviction. It does not appear that
 2 Coleman filed a direct appeal.²

3 On August 19, 2008, Coleman filed his first state habeas petition. The state court denied
 4 post-conviction relief on February 26, 2009. Coleman did not appeal. See ECF No. 1-1 at 78 n.2.
 5 On August 14, 2019, Coleman filed his second state habeas petition. Demarene Coleman v. State
 6 of Nevada, A-19-800228-W. The state court denied post-conviction relief on December 9, 2019.
 7 Coleman appealed, and the Nevada Court of Appeals affirmed on May 26, 2020. Demarene
 8 Coleman v. State of Nevada, 80055-COA. On September 21, 2020, Coleman filed a federal habeas
 9 petition, explaining that prison officials had miscalculated his statutory credits for parole eligibility
 10 under Nevada law. Coleman v. State of Nevada, 2:20-cv-01754-APG-EJY. This Court dismissed
 11 Coleman's federal petition without prejudice because his claims were not cognizable in federal
 12 habeas. On January 7, 2022, Coleman filed a motion to modify his sentence and appealed the state
 13 court's denial of that motion. The Nevada Court of Appeals affirmed on July 8, 2022. Demarene
 14 Coleman v. State of Nevada, 84292-COA. On April 5, 2023, Coleman filed his third state habeas
 15 petition. Demarene Coleman v. Warden Najera, A-23-868466-W. The state court denied post-
 16 conviction relief on July 25, 2023. Coleman appealed, and the Nevada Court of Appeals affirmed
 17 on November 28, 2023. Demarene Coleman v. Gabriela Najera, 86923-COA. And on October 9,
 18 2023, Coleman filed his fourth state habeas petition. Demarene Coleman v. State of Nevada, A-
 19 23-879247-W. The state court denied post-conviction relief on January 2, 2024. It appears that
 20 Coleman is presently appealing that decision. Demarene Coleman v. State of Nevada, 87992.

21 **II. DISCUSSION**

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 23 ² Coleman states that he appealed his judgment of conviction and that his appeal was decided on January 29,
 2009. ECF No. 1-1 at 1. However, there does not appear to be any appeal docketed on the Nevada appellate courts'
 website. Moreover, in its order affirming the denial of Coleman's third state habeas petition, the Nevada Court of
 Appeals stated, "Coleman did not appeal from the judgment of conviction." ECF No. 1-1 at 77 n.1.

1 Habeas Rule 4 requires the assigned judge to examine the habeas petition and order a
2 response unless it “plainly appears” that the petition is not entitled to relief. See Valdez v.
3 Montgomery, 918 F.3d 687, 693 (9th Cir. 2019). This rule allows courts to screen and dismiss
4 petitions that are patently frivolous, vague, conclusory, palpably incredible, false, or plagued by
5 procedural defects. Boyd v. Thompson, 147 F.3d 1124, 1128 (9th Cir. 1998); Hendricks v.
6 Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (collecting cases).

7 The Antiterrorism and Effective Death Penalty Act (“AEDPA”) establishes a 1-year period
8 of limitations for state prisoners to file a federal habeas petition pursuant to 28 U.S.C. § 2254. The
9 1-year limitation period begins to run from the latest of four possible triggering dates, with the
10 most common being the date on which the petitioner’s judgment of conviction became final by
11 either the conclusion of direct appellate review or the expiration of the time for seeking such
12 review. 28 U.S.C. § 2244(d)(1)(A). For a Nevada prisoner pursuing a direct appeal, a conviction
13 becomes final when the 90-day period for filing a petition for certiorari in the Supreme Court of
14 the United States expires after a Nevada appellate court has entered judgment or the Supreme
15 Court of Nevada has denied discretionary review. Harris v. Carter, 515 F.3d 1051, 1053 n.1 (9th
16 Cir. 2008); Shannon v. Newland, 410 F.3d 1083, 1086 (9th Cir. 2005); Sup. Ct. R. 13.

17 The federal limitations period is tolled while “a properly filed application for State post-
18 conviction or other collateral review with respect to the pertinent judgment or claim is pending.”
19 28 U.S.C. § 2244(d)(2). But no statutory tolling is allowed for the period between finality of a
20 direct appeal and the filing of a petition for post-conviction relief in state court because no state
21 court proceeding is pending during that time. Nino v. Galaza, 183 F.3d 1003, 1006–07 (9th Cir.
22 1999); Rasberry v. Garcia, 448 F.3d 1150, 1153 n.1 (9th Cir. 2006).

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1 Here, it appears that Coleman’s conviction became final when the time expired for filing a
2 direct appeal to the Nevada appellate courts on October 8, 2007. See Nev. R. App. P. 4(b)(1)
3 (requiring a notice of appeal to “be filed with the district court clerk within 30 days after the entry
4 of the judgment or order being appealed”); Gonzalez v. Thaler, 565 U.S. 134, 137 (2012) (when a
5 state prisoner “does not seek review in a State’s highest court, the judgment becomes ‘final’ on
6 the date that the time for seeking such review expires”). The federal statute of limitations thus
7 began to run the following day: October 9, 2007. Coleman filed his first state petition on August
8 19, 2008, tolling the AEDPA clock. As a result, 315 days elapsed between the finality of the
9 judgment and the filing of the state petition. The remaining 50 days of the AEDPA limitation
10 period were statutorily tolled during the pendency of all proceedings related to his state petition.
11 Tolling ended on February 26, 2009, when the state court denied his first state habeas petition
12 since Coleman did not seek appellate review of that decision. The AEDPA clock restarted the
13 following day: February 27, 2009. Consequently, the AEDPA clock expired 50 days later on April
14 20, 2009. Coleman’s instant Petition was received by this Court on January 9, 2024. Absent
15 another basis for tolling or delayed accrual, Coleman filed his Petition over 14 years after the
16 AEDPA limitation period expired. Although Coleman filed second, third, and fourth state habeas
17 petitions on August 14, 2019, April 5, 2023, and October 9, 2023, respectively, they were filed
18 after the AEDPA clock had already expired. As such, Coleman’s second, third, and fourth state
19 petitions could not have tolled an already expired limitations period. See Jiminez v. Rice, 276 F.3d
20 478, 482 (9th Cir. 2001).

21 Coleman must show cause why the Petition should not be dismissed with prejudice as time
22 barred. In this regard, Coleman is informed that the one-year limitation period may be equitably
23 tolled. Equitable tolling is appropriate only if the petitioner can show that: (1) he has been pursuing

1 his right diligently, and (2) some extraordinary circumstance stood in his way and prevented timely
 2 filing. Holland v. Florida, 560 U.S. 631, 649 (2010). “[E]quitable tolling is unavailable in most
 3 cases.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). And “the threshold necessary to
 4 trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.””
 5 Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002). Coleman ultimately has the burden of
 6 proof on this “extraordinary exclusion.” Miranda, 292 F.3d at 1065. He must demonstrate a causal
 7 relationship between the extraordinary circumstance and the lateness of his filing. E.g., Spitsyn v.
 8 Moore, 345 F.3d 796, 799 (9th Cir. 2003); accord Bryant v. Ariz. Att'y Gen., 499 F.3d 1056, 1061
 9 (9th Cir. 2007).

10 Coleman further is informed that, under certain circumstances, the 1-year limitation period
 11 may begin running on a later date³ or may be statutorily tolled. And Coleman is informed that if
 12 he seeks to avoid application of the limitation period based upon a claim of actual innocence, he
 13 must come forward with new reliable evidence tending to establish actual factual innocence, i.e.,
 14 tending to establish that no juror acting reasonably would have found him guilty beyond a
 15 reasonable doubt. See McQuiggin v. Perkins, 569 U.S. 383 (2013); House v. Bell, 547 U.S. 518
 16 (2006); Lee v. Lampert, 653 F.3d 929 (9th Cir. 2011). In this regard, “‘actual innocence’ means

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 18 ³ 28 U.S.C. § 2244(d)(1) provides as follows:
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 20 A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in
 21 custody pursuant to the judgment of a State court. The limitation period shall run from the latest of
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 23 (A) the date on which the judgment became final by the conclusion of direct
 24 review or the expiration of the time for seeking such review;
 25 (B) the date on which the impediment to filing an application created by State
 26 action in violation of the Constitution or laws of the United States is removed, if
 27 the applicant was prevented from filing by such State action;
 28 (C) the date on which the constitutional right asserted was initially recognized by
 29 the Supreme Court, if the right has been newly recognized by the Supreme Court
 30 and made retroactively applicable to cases on collateral review; or
 31 (D) the date on which the factual predicate of the claim or claims presented could
 32 have been discovered through the exercise of due diligence.

1 factual innocence, not mere legal insufficiency.” Bousley v. United States, 523 U.S. 614, 623
2 (1998).

3 **III. CONCLUSION**

4 **IT IS THEREFORE ORDERED** that the application to proceed *in forma pauperis* (ECF
5 No. 1) is granted.

6 **IT IS FURTHER ORDERED** that Petitioner Demarene Coleman show cause within 60
7 days of the date of this order why this action should not be dismissed as untimely. If Coleman does
8 not timely respond to this order or if Coleman responds but fails to show with specific, detailed,
9 and competent evidence why the Petition should not be dismissed as untimely, the action will be
10 dismissed with prejudice.

11 **IT IS FURTHER ORDERED** that all assertions of fact made by Coleman in response to
12 this show cause order must be detailed, must be specific as to time and place, and must be
13 supported by competent evidence. Coleman must attach copies of all materials upon which he
14 bases his argument that the Petition should not be dismissed as untimely.

15 DATED: May 14, 2024.



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17 RICHARD F. BOULWARE, II
18 UNITED STATES DISTRICT JUDGE
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